No. 16370

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEDRO AMADO TORRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

A jury found the appellant not guilty on Count One and guilty on Count Two of a two-count Indictment on August 21, 1958 after a trial in the United States District Court for the Southern District of California [C. Tr. 13-4, 30].[1] Count One charged that on or about March 25, 1958 the appellant stole and unlawfully took and carried away a Bolex movie camera and two lenses which were a part of an interstate shipment of freight and that said goods had a value in excess of $100 Count Two charged that on or about March 25, 1958 the appellant had the camera and lenses in his possession, knowing that they were stolen [C. Tr. 2-3]. The Court sentenced appellant to eighteen months on Count Two on September 5, 1958 [C. Tr. 15, 40]. The District Court had juris-

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[1]C. Tr. refers to the Clerk's Transcript; Tr. refers to the Reporter's Transcript.

diction under 18 U. S. C. §3231. Appellant filed notice of appeal within the time permitted by law [C. Tr. 54-55]. This Court has jurisdiction under 28 U. S. C. §1291.

Statement of the Case.

June 11, 1958. Indictment filed [C. Tr. 2-3].

June 30, 1958. Appellant arraigned and told that he was entitled to a trial by jury and to be represented by an attorney. Said appellant:

> "I would like to have one [an attorney] before I plead and time in which to pay the bonding company. I would like to have [time] so I could hire an attorney.
>
> The Court: I can put you over a week and give you a week. . . .
>
> Appellant: Could I plead now and then hire an attorney?
>
> The Court: Yes. . . ."

The appellant pleaded not guilty to both counts and the Court continued the case to July 7, 1958 for setting [Tr. 2a-4a].

July 7, 1958. Appellant appeared without an attorney. The Court continued the case to July 21, 1958 for setting and ordered appellant to be present with his attorney [C. Tr. 5].

July 21, 1958. Appellant appeared with Mr. Philip S. Schutz. The Court set the case for trial on August 12, 1958 [C. Tr. 6].

August 12, 1958. Appellant and Mr. Schutz appeared. Mr. Schutz made the following statement:

> "Mr. Schutz: This defendant consulted my office some days before July 26th, and about the time when

he was last present before your Honor. At that time he desired my services, and talked with me exceedingly briefly concerning the merits of the matter, and was to appear in my office on Saturday, July 26th. He neither appeared, nor communicated with us, and at that time I wired him by day letter, requesting him to inform me regarding his intentions in this matter on the following Monday.

On July 30th, not having heard from the defendant in any way whatever, I wrote him a letter which, in substance, indicated that the United States Attorney's office called me and asked me if I would be ready for trial on August 12th, and further advising him he had not seen fit to retain me or appear or respond to my wire, and instructing him to either make arrangements to be fully represented by me by August 1st, or I would assume my services were not required, and he would retain other counsel. A copy was sent to the United States Attorney, attention of Mr. Robert D. Hornbaker, Assistant United States Attorney.

Thereafter, on August 7th I received from the United States Attorney's office the trial memorandum in this matter, and following a conversation with Mr. Hornbaker, I forwarded the memorandum to the defendant at his last known address by letter, making reference to my previous correspondence, and advising the United States Attorney's office that it appeared to me that I did not, in fact, represent the defendant in the matter.

* * * * * * * *

Therefore, may it please the court, in response to a request from Mr. Hornbaker, I came in this morning, but I must represent to the court that I do not feel able to act in this man's behalf. I have had what I consider no cooperation whatsoever, and I therefore wish to be released."

The following colloquy then took place:

> "The Court: Mr. Torres, you heard Mr. Schutz' statement. Is that true?
>
> The Defendant: Yes."

The Court relieved Mr. Schutz after he stated that he would accept an appointment "with considerable feeling that I would not be entirely qualified to do as good a job as I might under other circumstances." Said he:

> ". . . in view of the defendant's entire lack in contacting the office, forgetting the question of my representing him, I don't feel your Honor, in good conscience that I could—well, I don't feel well disposed toward the man. . . ." [Tr. 6a-9a].

So the Court appointed Mr. Daniel G. Marshal and continued the case again to August 14, 1958 [C. Tr. 8].

August 14, 1958. Mr. Marshal moved for a continuance, stating only that he had seen Torres "rather briefly" and "was not prepared to go forward with [the] case" [Tr. 3]. Mr. Marshal also objected to impanelling a jury although the Court clearly indicated that after the jury was selected the case would be continued until the following day. Said Mr. Marshal:

> "I . . . object to the selection of the jury, because my selection of the jury, the questions I ask are always affected by the nature of the case I have to defend" [Tr. 4-5].

The Court ordered a jury selected and continued the case for five days to August 19, 1958 [Tr. 4-7].

August 19, 1958. Mr. Marshal made another motion for a continuance but gave no new reasons. The motion was overruled [Tr. 12-13]. The Government presented its case and rested [Tr. 14-100].

August 20, 1958. Mr. Marshal moved for a one day continuance to locate two alibi witnesses and "produce those witnesses if they have anything material to testify in this case." The Court granted the motion and continued the case to August 21, 1958 [Tr. 106-108].

August 21, 1958. Defendant rested without calling a single witness and without moving for a further continuance [C. Tr. 13-14].

August 21, 1958. Jury returned verdict of not guilty on count one, guilty on count two [Tr. 166].

I.

Appellant Was Not Denied the Right to Have Assistance of Counsel Under the Sixth Amendment.

The granting of a continuance is a matter within the sound discretion of the trial court and will not be reviewed on appeal unless there is a clear abuse of discretion.

> *Williams v. United States,* 203 F. 2d 85 (9th Cir., 1953);
>
> *Sherman v. United States,* 241 F. 2d 329, 338 (9th Cir., 1957).

The refusal to grant a continuance, however, might be an abuse of discretion if it deprived a defendant of the effective assistance of counsel. Thus, in *Avery v. Alabama,* 308 U. S. 444 (1940), the Court said:

> "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by

the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

"But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

Whether a defendant has been denied the assistance of counsel depends upon all the facts and circumstances in the case, such as the nature of the charge, the issues presented, counsel's familiarity with the applicable law, the pertinent facts and the availability of material witnesses.

C. J. S., §478;

Ray v. United States, 197 F. 2d 268, 271 (8th Cir., 1952).

Also, the defendant must make a showing of such facts and circumstances. In *Neufield v. United States,* 118 F. 2d 375 (D. C. Cir., 1941), the defendant was convicted with others of bank robbery. He had been represented by counsel from the time of his arraignment on September 21, 1939, to the date set for trial. On that date the defendant moved for a continuance to further prepare and to obtain witnesses. In sustaining a denial of the motion the Court said:

"The granting or refusal of a continuance is a matter of discretion of the judge to whom application

is made. Avery v. Alabama, 1940, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; Isaacs v. United States, 1895, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; Tomlinson v. United States, 1937, 68 App. D.C. 106, 93 F. 2d 652, 114 A. L. R. 1315, certiorari denied, 1938, 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1107. Therefore, under elementary principles of review, a trial court's ruling granting or refusing a continuance will not be reversed except for abuse of discretion. A party seeking a continuance must make a showing that the same is reasonably necessary for a just determination of the cause. If the continuance is sought for the purpose of securing the attendance of witnesses, it must be shown who they are, what their testimony will be, that it will be relevant under the issues in the case and competent, that the witnesses can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for the trial as set. These propositions are so elementary as to require the citation of nothing but general authorities. See 12 American Jurisprudence, pages 448-471, inclusive, especially Sections 5, 9, 23, 24, 28; 16 Corpus Juris, pages 450-512, inclusive, especially Sections 829, 831, 846, 892, 921, 925; 22 C. J. S. Criminal Law pp. 737-837, inclusive, especially §§486, 488, 491, 502, 513.

In the instant case no showing was made that during the time between the arraignment on September 21, 1939, and the date of the trial, November 15, 1939, Neufield's counsel Solomon was excusably prevented from searching for witnesses or otherwise preparing the defense of the case. No showing was made as to the identity of the proposed witnesses or as to the nature, relevancy and competency of their testimony, or that they could be obtained if the con-

tinuance was granted. In these circumstances and in view of the further fact that the ten days' notice requested by Neufield's counsel of the date of trial was given, we cannot say that the trial judge must reasonably have concluded that the showing for a continuance was sufficient, and we cannot, therefore, say that he abused his discretion in refusing the continuance. Indeed, we think the showing for continuance was clearly insufficient. If, under the circumstances set out, a continuance must be granted, there will be no end to delays in criminal cases. Moreover, it was not made to appear in Neufield's motion for a new trial that any harm came to him through the refusal of the continuance. While the motion in general terms charged error in not granting the continuance, it made no particularization of any material witnesses or testimony that could have been produced had the continuance been granted. And it particularized no way in which Solomon could better have prepared the case if the continuance had been granted. In *Avery v. Alabama, supra,* the Supreme Court said: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." And in the same case the Supreme Court recognized that "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel."

In the instant case, appellant made no showing that Mr. Schutz was excusably prevented from searching for witnesses or otherwise preparing the defense. The record

shows that Mr. Schutz did nothing solely because he had had "no cooperation whatsoever" for over two weeks. Torres admitted this was true [Tr. 6a-7a].

Also, Mr. Marshal made no showing that he was excusably prevented from searching for witnesses. He failed to mention witnesses in his motions for continuances until after the Government had rested. He then moved for a continuance "so that we may be able to continue our investigation and produce . . . witnesses if they have anything material to testify to in this case" [Tr. 106]. The Government did not object and the Court granted the continuance. When the case resumed, the defense rested without calling a single witness and without making a further motion for a continuance. Presumably, the defendant found the unnamed witnesses and they did not have anything material to testify to. Otherwise, Mr. Marshal, who had already made three motions for a continuance, would have renewed the request. His failure to do so was a tacit admission that no further continuance was needed or necessary.

Mr. Marshal made no showing that he was otherwise prevented from preparing the case. In fact, the record shows a competent and well prepared defense. Mr. Marshal objected to the introduction of every Government exhibit [Tr. 20, 31, 38, 39, 43, 45, 51, 57, 62, 100]. He made some 50 other objections during the three-hour trial [Tr. 14, 24, 25, 26, 28, 29, 30, 32, 36, 37, 39, 40, 42, 43, 45, 48, 50, 56, 59, 60, 61, 68, 69, 70, 71, 96, 97, 98, 99]. His examination of Berny Silver, the principal government witness, was detailed and masterful [Tr. 73-95]. His objections to the giving and failure to give certain instructions have the mark of a master [Tr. 110-131].

Two cases are close on their facts to our situation. In *Couchis v. United States,* 142 F. 2d 1 (5th Cir., 1944), the defendant was found guilty on two counts of sedition. Like Torres, he had been given a reasonable time to get counsel and then showed up for trial without an attorney. The Court appointed counsel, denied a motion for a continuance and ordered the case to trial as scheduled. In affirming, the Court said:

> "Under these circumstances, we do not think that it can be said that the refusal of the continuance was an abuse of discretion or that the defendant was otherwise denied a fair trial. If plaintiff had been represented by counsel of his own choosing, there would be no doubt about this, *Chastain v. United States,* 5 Cir., 138 F. 2d 413. Can it be that the fact alone that his counsel was court appointed instead of selected by the defendant has made an unfair trial of an otherwise fair one? We do not think so. It is true that the fact that defendant has no counsel and that the court appoints counsel for him on the day of, and refuses to delay, the trial is a fact to be considered in connection with the other facts in determining whether the trial has been fair, Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. It is equally true, though, that this is only one of the many facts having bearing on the trial as a whole, and that the fact alone that counsel was appointed and a continuance was denied on the day of trial will not support a finding either of abuse of discretion in denying the continuance or of the denial of a fair trial, Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; Neufield v. United States, 73 App. D. C. 174, 118 F. 2d 375. There was here no showing by defendant or his counsel that a particular witness, or witnesses, would, if present, testify to particular material facts. None

that if the trial was postponed or delayed, such witnesses or their testimony could be procured. There was merely a general request by counsel for a continuance so that he could more fully acquaint himself with the case and procure the necessary witnesses; a statement by the defendant that he was perhaps as ready as he ever would be; and an assurance by the court that counsel would be given all the time he needed to confer with his client and acquaint himself with his defenses. To hold that under these circumstances a denial of justice has occurred would be in effect to hold, that where a defendant appears without counsel and the court appoints counsel for him, all of the ordinary rules governing the orderly administration of the court are suspended; and that a dedefendant thus situated may freely chance a trial in the confidence that if he is acquitted, the verdict will stand, while if he is convicted, the verdict will because and only because he is represented by appointed counsel, be set aside. Universally protective as are the guarantees of due process, and compelling as are the considerations which make a vigilant concern for their affording of the essence of a fair trial, courts sit as well to convict the guilty as to acquit the innocent, and complaint alone, without a showing, that a fair trial has been denied, will not support a reversal. The record shows no reversible error."

In *United States v. Majeske,* No. 16,018, decided February 25, 1959, this Court passed on the same question. There, a Mr. Hanifin prepared the case but could not appear on the trial date. Instead, a Mr. Harry Alkow, who had represented the defendant at arraignment on December 9, 1957, appeared and moved for a continuance. The Court directed Mr. Alkow to select a jury and postponed the trial until the next day. Mr. Hanifin could not appear

again and the case was ordered to trial with Mr. Alkow acting for the defendant. In affirming, this Court said:

> "So far as Majeske was concerned, no prejudice has been shown. So far as the record before us shows, Alkow properly represented him. No error has been pointed out. Therefore, irrespective of the fact that he was not represented by the counsel whom he originally employed, the conviction must be affirmed. He did not object to the representation by Alkow when the plea was entered. Neither Hanifin nor Alkow nor defendant had advised the court before the date set for trial that Hanifin could not be present. The courts could not be successfully administered if such an excuse were held good ground for postponing a trial for several days to suit the convenience of the attorney. If it were valid in one case, the court might have the same type of excuse in every case called. Here the court did grant one day extension, during which time arrangements for defense could have been made."

So it would seem that where an attorney, as here, had from August 12th until August 21st to prepare his case there can be no error. This is especially true in a "fact" case where the defendant got all the time he asked for to find witnesses and where counsel ably and competently represented him.

> *Cf., Baker v. United States,* 255 F. 2d 619, 621 (9th Cir., 1958).

Instead of being deprived of the right to counsel, this defendant got the assistance of—not one—but two counsels.

II.

Acquittal on the Theft Count Did Not Amount to an Acquittal on the Possession Count.

Appellant relies on the language of Chief Judge Yankwich that "the 'possession' part of this law 'could not mean that the man who steals (the property) can be charged with possession after he has been acquitted of stealing' [R. 239/17-19] and that the only possession proved here is not the possession contemplated by this statute [R. 241/3-5]." Appellant continues: "In granting these motions [for leave to appeal *in forma pauperis* and to fix bail pending appeal] [R. 242/12, 24] the Chief Judge prefaced his ruling by saying that here 'theft implies possession, and unless you have evidence that the possession was that of property which someone else stole, the second offense is not committed, because the possession implied in larceny is not enough to convict under the second paragraph, and this second paragraph is a distinct offense, as the statute indicates.' [R. 242/6-11.]" (App. Br. p. 13.)

The above statements should be compared with the facts: Mr. Roberts, a dock man for Interstate Express Inc., received the Bolex camera and lenses at the Interstate platform, 320 South Hewitt Street, Los Angeles, on March 25, 1958 [Tr. 63-66, 88]. Mr. Paul Williams, a freight forwarder operating under the name of Interstate Express, said that they turned up missing the following day and that they could not be found after a search by three men [Tr. 46-48]. The Government Attorney told the jury in his Opening Statement that he was not going "to call any witness who actually saw the defendant steal the camera from the loading platform" [Tr. 11]. Mr. Marshal made this statement one of the cornerstones of his defense. Said he, in moving for a judgment of acquittal early in the

case: "According to the Government's opening statement, it admits there will be no eyewitness to actually testify" [Tr. 12]. And in his closing argument, he said: "But stop and think—is there one word of evidence that the defendant was even in this room when the property was stolen" [Tr. 142]. Again, in moving for a judgment of acquittal at the close of the Government's case, he said: ". . . is there any evidence here that the camera was stolen? There is evidence here that the camera was missing from the freight platform after it was checked in there by the consignor. But so far as the theft is concerned, there isn't even any evidence of theft" [Tr. 177-178]. Berny Silver said that he bought the camera and lenses from Torres "in the latter part of March or first part of April" [1958] at 507 North St. Louis Street, Los Angeles [Tr. 67-68], and the jury was instructed that "possession of stolen property shortly after the theft is a circumstance tending to show theft unless the possession is satisfactorily explained" [Tr. 155]. Still, the jury was apparently persuaded by Mr. Marshal's vigorous argument that the appellant should not be found guilty of theft unless someone saw him take the property. Nevertheless, the Government argues that the fact that the camera and lenses were delivered to an Interstate platform for shipment on March 25th, that they turned up missing the next day, that they could not be found after a diligent search and that they were found shortly thereafter in the unexplained possession of the defendant in an obscure coffee shop was sufficient evidence for the jury to find that they had been stolen *by someone.*

> *Cf. United States v. Gollin,* 166 F. 2d 123 (3rd Cir., 1947).

In this connection, the Court should view the evidence most favorably to the Government.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-377 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

Defendant says *Prince v. United States,* 352 U. S. 322 (1957), "teaches that if defendant stole the property himself there could be only one offense because theft could not be proved except by also proving possession it follows that his acquittal of the theft (the Government having failed to prove another was the thief), operated as an acquittal of possession since the innocent verdict included a finding he did not possess the stolen property he was acquitted of stealing." (App. Br. p. 13.)

Prince v. United States, supra, teaches nothing of the kind.

In the *Prince* case the defendant was convicted under 18 U. S. C. §2113 of entering a national bank with intent to commit a felony and robbing the bank. The defendant got consecutive sentences and the only question was whether the entering count merged into the robbery. In

holding that it did, the Court carefully examined the legislative history of 18 U. S. C. §2113, saying:

> "In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purpose of punishment. None of these is particularly helpful to us because *we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar and other problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.*" (Italics added.)

How could the Court have stated any more clearly that they did not intend their decision to have any effect on problems raised under other statutes?

Contrary to appellant's interpretation of the *Prince* case, there are many Circuit Court cases under 18 U. S. C. §659 holding that theft and possession by the thief are separate offenses. The question first arose in *Carpenter v. Hudspeth,* 112 F. 2d 126 (10th Cir., 1940), cert. den. 311 U. S. 682 (1940). There, the defendant Carpenter was charged under 43 Stat. 793 (1925), 18 U. S. C. §409 (1940), which provided in pertinent part:

> "That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larcency therein; or *whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house platform, depot, wagon, automobile, truck, or other vehicle, or from any steamboat, vessel, or wharf, with intent to*

convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been stolen, *shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, . . .*"*

---

*63 Stat. 91 (1949), 18 U. S. C. §659 (1950), which consolidated part of 18 U. S. C. §409 (1940) with other sections, now provides:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattel moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to been embezzled or stolen; . . .

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The defendant was found guilty with others on four counts of a first indictment charging (1) breaking the seal on a railroad car with intent to commit larceny therein, (2) stealing footwear from the car, (3) receiving and possessing the footwear, knowing they had been stolen, and (4) conspiracy to break the seal, steal, receive and possess the footwear. He was also found guilty on four counts of a second indictment charging (1) entering the car with intent to commit larceny, (2) theft of tables from the car, (3) purchase, receipt and concealment of the tables, and (4) conspiracy to receive and conceal the tables. The defendant was sentenced to five years on the first, second and third counts of the first indictment and to two years on the fourth count, to be served consecutively. He received similar sentences on the four counts of the second indictment, to be served concurrently with those of the first. Defendant claimed, in a petition for a writ of habeas corpus, that the first, second and third counts of each indictment were based on one continuous transaction and constituted a single offense. The Court, considering only the first indictment, denied the writ, saying:

> "The statute clearly embraces several separate and distinct offenses. Breaking the seal of a railroad car containing an interstate shipment of freight is one; entering the car with intent to commit larceny therein is another; stealing merchandise from the car is a third; and concealing property with knowledge that it had been stolen from such a car is a fourth. *Morris v. United States,* 8 Cir., 229 F. 516; *Greenburg v. United States,* 7 Cir., 253 F. 728; *Caudle v. United States,* 8 Cir., 278 F. 710. And the power of Congress thus to provide that separate acts, though parts of a continuous transaction, shall constitute separate

crimes cannot be doubted. *Burton v. United States,* 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Morgan v. Devine,* 237 U. S 632, 35 S Ct. 712, 59 L. Ed. 1153; *Reger v. Hudspeth,* 10 Cir., 103 F. 2d 825, certiorari denied, 308 U. S. 549, 60 S. Ct. 79, 84 L. Ed. .....

"In a case of this kind where a single continuous transaction may constitute a violation of distinct provisions in a statute, the test in determining whether separate offenses are charged in different counts of the indictment is whether each count requires proof of a fact which is not required of the others. *Chrysler v. Zerbst,* 10 Cir., 81 F. 2d 975; *Norton v. Zerbst,* 10 Cir., 83 F. 2d 677, certiorari denied, 299 U. S. 641, 57 S. Ct. 24, 81 L. Ed. 398; *Reger v. Hudspeth, supra.* Here proof of breaking the seal with intent to commit larceny in the car was sufficient to warrant a conviction upon the first count. No proof of entering the car, committing larceny from it, or receiving or concealing the stolen property was required. Again, proof of larceny of merchandise from the car was enough to justify conviction upon the second count. No proof of breaking the seal, or of concealing the stolen chattels was necessary. *And proof of having possession of the stolen merchandise at a subsequent time and different place from its theft, with knowledge that it had been stolen, was suffiicent to support conviction upon the third count.* One defendant receiving it from another could have been convicted on such proof even though he did not take part in breaking the seal, entering the car, or committing the larceny. It is manifest that the several counts each charged a separate and distinct crime, entirely apart from the others." (Italics added.)

On appeal, in *United States v. Carpenter,* 143 F. 2d 47 (7th Cir., 1944), Judge Evans said:

> "Appellant argues that a proper interpretation of the grammatical and structural composition of the statute (18 U. S. C. A. §409) necessitates the conclusion that Congress meant to impose penalties for any of three separate *classes* or *categories* of crimes. It did not, however, mean to make a separate crime of every *act* described in each of the several classes or categories. In support of such theory, counsel points out that each category begins with the identical word 'whoever' and is set off by semi-colons, whereas the several condemned acts within the respective categories are not so stated, merely being joined with the disjunctive 'or' and separated by commas.
>
> "The statute reads (we add the numerals which appellant uses to designate his categories):
>
> " '(1) Whoever shall unlawfully break the seal of any railroad car . . . or shall enter any such car with intent in either case to commit larceny therein; (2) or whoever shall *steal* or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car . . . with intent to convert to his own use any goods or chattels . . ., or shall buy or *receive* or have in his possession any such goods or chattels, knowing the same to have been stolen; (3) or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain with intent to convert . . . any baggage, . . . or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage . . . shall *in each case* be fined not more than $5,000 or imprisoned not more than ten years, or both . . .'

"It is counsel's urge that the second and third counts, namely, for stealing and for receiving, are for but a single crime in that they are both covered by the one category, *i.e.,* class (2), and therefore appellant has suffered two five year sentences but one crime.

"Appellant also stresses the phrase *'in each case'* as being indicative of Congressional intent to impose a sentence only upon each of the *classes of acts* outlined.

"A second contention, which was the one involved in the habeas corpus proceedings, is that the charge of stealing and possessing does not define two crimes because only one criminal intent was involved. In other words, in all cases where there is a stealing, there is, *per se,* a possessing.

"Counsel stresses the fact that the bill of exceptions, which was not consulted on the prior appeal because not duly filed, disclosed that appellant was not even at the site of the crime, but a block distant, and only by virtue of a conspiracy or by proxy could he be deemed to have participated in the stealing.

"Appellant also contends that there is duplication of punishment in the imposition of a sentence on the conspiracy count, for the same evidence was used to gain a conviction on this count as was used to establish guilt under the first three counts.

"The earnestness of counsel, the severity of the sentence, and the parolement of appellant to service in the army, have all impelled us to re-examine this statute and the decisions.

"We repeat the statute, but in skeleton form. It would seem that crimes were described therein as follows:

"(1) break the seal
enter

(2) (as to goods or chattels in interstate commerce)
steal
unlawfully take
carry away
conceal
obtain by fraud or deception
buy
possess

(3) (as to any baggage)
steal
unlawfully take
carry away
obtain by fraud or deception.

"Congress defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated these many acts. It intended to make criminal *any* act therein recited. If two of the acts in any category were disclosed, two crimes were committed. It would be different if the terms were synonymous of the acts, one within the scope, or partial scope of the other, but each defines an act of a different nature. It is true that one who steals generally possesses, but the contrary is not inherently true.

"Another possible explanation for the categorical structure of the section might be that one category relates to the stealing of interstate freight, a second to stealing of baggage, and the third, the initial steps of such larceny, *i.e.,* entering a freight car.

"We are unable to read the statute other than that Congress intended to make each and every separate act named, a separate crime. See *Blockburger v. United States,* 7 Cir., 50 F. 2d 795; *Id.,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Carpenter v. Huds-*

peth, 10 Cir., 112 F. 2d 126. If the construction seems harsh, it must also be appreciated that there is a vast difference between the maximum and the minimum sentence provision as there is a vast difference between the action and motives of different offenders. In the trial judge, there is lodged wide discretion, and if misjudgment results in too severe judgments, the accused may secure relief through executive clemency, as well as by parole.

"Our problem is to construe the statute. In so doing, we cannot rewrite it, nor ignore the language which is clear. . . ."

United States v. Carpenter, supra, was followed in *United States v. Dunbar,* 149 F. 2d 151 (7th Cir., 1945), *cert. den.* 325 U. S. 889 (1945).

Three other circuits have followed the above decisions. In *Carroll v. Sanford,* 167 F. 2d 878 (5th Cir., 1948), the Court said:

"Section 409 of Title 18 U. S. C. A., punishes not only those who steal interstate freight but also whoever 'shall buy or receive or have in his possession any such goods or chattels knowing the same to have been stolen.' *The thief can, after stealing, have in his possession the stolen property knowing the same to have been stolen, and thus commit a further and different offense, and be punished for both. United States v. Dunbar,* 7 Cir., 149 F. 2d 151; *Carpenter v. Hudspeth,* 10 Cir., 112 F. 2d 126. *We do not say that the possessioin involved in the act of stealing would suffice, because the goods must have been fully stolen before there could be knowledge that they were stolen goods.* In the present habeas corpus hearing it appeared from the record of conviction in 1944, and from the evidence, that a case of cigarettes was stolen

by appellant and on the same date the same case of cigarettes was in his possession, and that he was given separate consecutive sentences as for the two crimes under discussion, the first sentence having now been served. This is not enough to show that he is suffering double punishment for the same offense contrary to the Constitution." (Italics added.)

In *Carroll v. United States,* 174 F. 2d 412 (6th Cir., 1949), the Court said:

"The majority of the court is of opinion that stealing goods from an interstate shipment of freight and the possession of the same goods with knowledge that the same have been stolen constitute separate and distinct offenses under Section 409 of the Criminal Code; and that it is, therefore, lawful to impose separate punishment for stealing and for felonious possession of the stolen goods. This has been the long accepted and applied interpretation of the statute by the United States District Courts, and has been upheld directly by three United States Courts of Appeals, namely, those for the Seventh Circuit, the Tenth Circuit, and the Fifth Circuit. *United States v. Carpenter,* 7 Cir., 1944, 143 F. 2d 47. *United States v. Dunbar,* 7 Cir., 1945, 149 F. 2d S. Ct. 1577, 89 L. Ed. 2002; *Carpenter v. Hudspeth,* 10 Cir., 1940, 112 F. 2d 126; *Carroll v. Sanford,* 5 Cir., 1948, 167 F. 2d 878.

"Judge Bratton pointed out in *Carpenter v. Hudspeth, supra,* that the statute clearly embraces several separate and distinct offenses: (1) breaking the seal of a railroad car containing an interstate shipment of freight; (2) entering the car with intent to commit larceny therein; (3) stealing merchandise from the car; and (4) concealing property with knowledge that it had been stolen from such a car; and that the

power of Congress thus to provide that separate acts, though parts of a continuous transaction, shall constitute separate crimes cannot be doubted.

"Judge Evan Evans, in *United States v. Carpenter, supra,* made a careful and logical analysis of the statute, even to the point of considering and weighing the argument of appellant in that case based upon the grammatical and structural composition of the statute and the placement of semi-colons and commas. He skeletonized the statute into the separate crimes described therein, and stated that Congress had defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated the many acts intended to be made criminal. He said: 'If two of the acts in any category were disclosed, two crimes were committed. It would be different if the terms were synonymous or the acts, one within the scope, or partial scope of the other, but each defines an act of a different nature. It is true that one who steals generally possesses, but the contrary is not inherently true. . . . We are unable to read the statute other than that Congress intended to make each and every separate act named, a separate crime. See *Blockburger v. United States,* 7 Cir., 50 F. 2d 795; Id., 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Carpenter v. Hudspeth,* 10 Cir., 112 F. 2d 126. If the construction seems harsh, it must also be appreciated that there is a vast difference between the maximum and the minimum sentence provision as there is a vast difference between the action and motives of different offenders. In the trial judge, there is lodged wide discretion, and if misjudgment results in too severe judgments, the accused may secure relief through executive clemency, as well as by parole. Our problem is to construe the statute. In so doing, we can-

not rewrite it, nor ignore the language which is clear.' 143 F. 2d 48.

"It should be observed that, in the instant case, the district judge would have been empowered within the limit of the statute to impose a sentence of ten years' imprisonment on the first count of the indictment; but he chose to impose five-year consecutive sentences on the two counts. It is obvious from his order, quoted above, that he considered that an aggregate ten-year sentence was required to make the punishment fit the crime. It is thus apparent that appellant has not been prejudicially affected by the judge's chosen course even were he right in his contention, which the majority of the court thinks he is not.

"In *United States v. Dunbar, supra,* in which certiorari was denied by the Supreme Court, the Court of Appeals for the Seventh Circuit held again, in affirming an order of the district court denying the motion of the convicted defendant to modify sentence and correct judgment, that the district court had power to impose sentences, for theft of merchandise from a railroad car and for possession of the same merchandise, to be served consecutively even though the separate offenses constituted parts of a single continuous transaction.

"While the Supreme Court has made it clear that the denial of a writ of certiorari imports no expression of opinion upon the merits of a case, we are constrained to think that denial of certiorari in *United States v. Dunbar, supra,* should not be treated as meaningless. The precise issue here was there presented and involved the continuance, if erroneous, of long established practice in the district courts to treat theft from interstate commerce shipment and possession of the goods so stolen as separate and distinct offenses. In view of the importance of the

question in the administration of criminal justice in the United States Courts, it would seem that had the Supreme Court considered the practice wrong and that double punishment was unlawfully being meted out the decision of the Court of Appeals in the Dunbar case, which followed the earlier decisions, would have been reversed. This is a reasonable inference from the fact that the Supreme Court did correct the error of the inferior federal courts when it held that the offense of bank robbery by the use of deadly weapons, as defined in section 588b(b), Title 12 U. S. C. A. [now 18 U. S. C. A. §2113], is the same offense described in section 588b(a), aggravated by the use of a deadly weapon; and that Congress did not intend to define two separate offenses, but only one. See *Lockhart v. United States,* 6 Cir., 136 F. 2d 122, 124, and cases cited.

"The Court of Appeals for the Fifth Circuit has declared itself in accord with the opinions of the Seventh and Tenth Circuits upon the subject matter. In *Carroll v. Sanford,* 5 Cir., 167 F. 2d 878, it was held that a thief can, after stealing goods from an interstate shipment, have in his possession the stolen property knowing it to have been stolen and thus commit a further and different offense under section 409 of the statute and be punished for both."

In *United States v. Dolasco,* 184 F. 2d 746 (3rd Cir., 1950), the Third Circuit followed the rule. There the defendant was indicted in two separate counts under 18 U. S. C. §659 for stealing goods in interstate commerce and for "receiving or possessing" such goods knowing them to have been stolen. The jury found defendant guilty of stealing and not guilty of receiving and possessing. Defendant argued that the verdict of guilty on the stealing count could not stand because it was inconsistent

with a verdict of not guilty on the possession count. The Court said:

> "There are two answers to the defendant's second ground for reversal, the alleged inconsistency of the verdicts. A short one is that consistency in the verdicts is not necessary, even though the same evidence is offered in support of each. *Dunn v. United States,* 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356. Each count in the present indictment charges a separate crime and it is enough if there is sufficient evidence to support the jury's verdict of guilty on any one.
>
> "Second, the two verdicts are not necessarily inconsistent. The jury may well have believed that defendant participated in the stealing of the goods but that he never had possession or received them in the sense in which those terms are understood by laymen. Defendant was never seen to handle the goods, and it may well be too much for a group of non-lawyers to see how a man has received something he has not touched. That this was in the minds of the jurors is evidenced by the fact that when the jury was summoned for further instructions, and upon being told that 'a person may be guilty of stealing merchandise whether he does it himself or through people working under his direction,' the jury reached a verdict quickly. The defendant cannot complain that the judge did not add that he may also be guilty of possessing stolen goods if they are possessed by persons acting under his direction and control. If such an omission was error, it was in the defendant's favor."

In our case, the jury did the opposite; they found appellant guilty of possessing, but not guilty of stealing. Since they were separate offenses, there was no inconsistency.

The jury simply refused to convict appellant of stealing where no one saw him take the goods. But they had no difficulty in convicting him of possessing the goods, knowing they were stolen, where the evidence showed that he had them in his unexplained possession soon after the theft and where he sold them for a fraction of their market value in an obscure coffee shop.

Appellant asks for a reversal on the "teachings" of the *Prince* case, *supra*. It is inconceivable that the Supreme Court would have overruled the established law of five Circuits without mentioning one of their cases.

Significantly, the decisions in all Circuits have been cited with approval by this Court.

> *Thomas v. United States,* 249 F. 2d 429 (9th Cir., 1957).

III.

The Government Proved Beyond a Reasonable Doubt That the Property Had a Value in Excess of $100.

The Government introduced the invoice of the seller, Paillard Products, Inc., Los Angeles, as Government Exhibit No. 2 [Tr. 32]. The invoice was prepared in New York from information supplied by Los Angeles and a copy was sent to Los Angeles [Tr. 21-22]. The invoice showed that the seller billed the Great Western Camera Exchange in Denver $84.06 for the camera and one lens [Tr. 27-28], and $35 for the other lens [Tr. 31]. These were prices which a willing buyer agreed to pay a willing seller. The invoice also showed list prices of $134.50 and $52.50, respectively [Tr. 27, 31]. The goods were fair traded [Tr. 98].

Miss Lida Stefan, the office manager for Paillard Products in Los Angeles, stated that in her seven years

with the company she had learned the prices of various cameras [Tr. 97-98]. She said that the camera and one lens had a fair market value of $139, and that the other lens had a fair market value of $52.50 [Tr. 99].

Defendant cites 18 U. S. C. §2311 for a definition of value. This definition is only applicable to Chapter 113 of Title 18, Sections 2311-7. Defendant also cites *Abbott v. United States,* 239 F. 2d 310 (5th Cir., 1956), a case decided under 18 U. S. C. §2314, for the proposition that market value "depends on a market, whether formal, or informal, in which willing buyers bargain with willing sellers." The Government feels that such a value in excess of $100.00 was proved.

However, it should be pointed out that in Chapter 31 of Title 18, Section 641-663, Congress used a much broader definition of value in setting forth the dividing line for penalties in the theft of Government property. 18 U. S. C. §641 provides that:

> "The word 'value' means face, par, or market value, *or cost price, either wholesale or retail, whichever is greater*" (italics added).

So if the Court feels that market value in excess of $100.00 was not proved the Court should find that there was sufficient evidence of cost price and wholesale or retail price in excess of that figure.

Appellant argues that the property was "invoiced in New York for sale in Wyoming and defendant charged with its possession in Los Angeles." He says: "The wit-

ness Stefan . . . had no retail experience in Los Angeles or elsewhere . . . Clearly there was no evidence of the Los Angeles reasonable market value except that of the Government's witness Silver who fixed it at not more than $40.00" (Appellant's Brief, pp. 14-15). However, Berny Silver, at one point said, "To be honest with you, I had no idea what the camera was worth" [Tr. 75]. So appellant's argument boils down to this: that market value means the price which a dupe buyer will pay a willing fence for hot property in the city where the fence decides to sell it. It could not be the price which a willing retailer would pay a willing wholesaler before it was stolen in the city where the seller is located because, according to appellant, the retailer "might" want to sell it at a loss in some other city. Appellant makes a mockery of market value.

IV.

The Government Proved Beyond a Reasonable Doubt That Appellant Knowingly Possessed Stolen Property.

The Government showed that the appellant sold goods with a fair market value of $119.06, and a fair trade list price of $187, for $40, to an uninformed buyer in an obscure coffee shop soon after the theft. The Government need not prove more.

> *Cf. Najjar v. United States,* 152 F. 2d 965 (5th Cir., 1946);
>
> *Nabutin v. United States,* 8 F. 2d 491 (7th Cir., 1925), cert. den. 269 U. S. 585 (1925).

Conclusions.

1. Appellant was not denied the right to assistance of counsel under the Sixth Amendment.

2. Acquittal on the theft count did not amount to an acquittal on the possession count.

3. The Government proved beyond a reasonable doubt that the property had a market value in excess of $100.

4. The Government proved beyond a reasonable doubt that appellant knowingly possessed stolen property.

Respectfully submitted,

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